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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

v.

LYLE GERALD JOHNS, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May packages which have been seized but not opened from pick-up trucks during a warrantless probable cause search, and immediately stored in a government warehouse, be searched without a warrant several days after their seizure?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT	1
REASONS FOR DENYING THE PETITION	
I. The decision by the Court of Appeals was correct.	
a. General principles.	4
b. The applicability of Ross.	12
c. Other reasons that support the decision by the Court of Appeals.	23
II. Additional reasons that the Court should deny the Petition.	
a. The decision below is not in conflict with the decisions of other circuits.	33
b. The decision in this case is not one which is likely to affect a significant number of future cases.	35
CONCLUSION	39

TABLE OF AUTHORITIES

Cases	Page
Arkansas v. Sanders, 442 U.S. 753 (1979)	4
Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968)	34
Cady v. Dombrowski, 413 U.S. 433 (1973)	8, 31
Cardwell v. Lewis, 417 U.S. 583 (1974)	7, 8, 31
Carroll v. United States, 267 U.S. 132 (1925)	1, 5, 7, 20
Chambers v. Maroney, 399 U.S. 42 (1970)	passim
Chimel v. California, 395 U.S. 752 (1962)	17
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	7
Cooper v. California, 386 U.S. 58 (1967)	1, 31
G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977)	27, 28
Illinois v. Andreas, ___ U.S. ___, 103 S.Ct. 3319 (1983)	25, 26, 37

Cases (Continued) **Page**

Katz v. United States,
389 U.S. 347 (1967) 5, 21

Layne & Bowler Corp. v.
Western Well Works,
261 U.S. 387 (1923) 36

Michigan v. Clifford,
___U.S.___, 104 S.Ct. 641 (1984) 28, 29

Michigan v. Tyler,
436 U.S. 499 (1978) 27, 29

Mincey v. Arizona,
437 U.S. 385 (1978) passim

New York v. Belton,
458 U.S. 259 (1981) 16, 17, 38

Northeastern National Bank v.
United States,
387 U.S. 213 (1967) 34

Preston v. United States,
376 U.S. 364 (1964) 18, 27, 29

Rice v. Sioux City Cemetary,
349 U.S. 70 (1955) 36

Sharp v. United States,
712 F.2d 65 (4th Cir. 1983) 33, 34

South Dakota v. Opperman,
428 U.S. 364 (1976) 31

Terry v. Ohio,
392 U.S. 1, 29 (1968) 6, 21, 22

Cases (Continued) **Page**

Texas v. Brown,
___U.S.___, 103 S.Ct. 1535
(1983) passim

Texas v. White,
423 U.S. 67 (1975) 7, 16

Walter v. United States,
447 U.S. 649 (1980) 9

United States v. Chadwick,
433 U.S. 1 (1977) passim

United States v. Edwards,
415 U.S. 800 (1974) passim

United States v. Jacobsen,
___U.S.___, No. 82-1167
(April 2, 1984) 10, 15

United States v. Place,
___U.S.___, 103 S.Ct. 2637
(1983) 9, 11, 23, 24

United States v. Rabinowitz,
339 U.S. 56 (1950) 6, 21, 22

United States v. Rivera,
684 F.2d 308 (5th Cir. 1982) 33, 34

United States v. Ross,
456 U.S. 798, 807 (1982) passim

United States v. Schecter,
717 F.2d 864 (3d Cir. 1983, 33

Constitutional Provisions

U.S.Const., Amend.IV passim

Other Authority **Page**

Mr. Justice Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Australian L.J. 109 (1959) 35

Stern & Gressman, Supreme Court Practice, §4.11, pp.284-285 (1978) 36

STATEMENT

In its Petition for a Writ of Certiorari, the government attempts to characterize the search below as no more than a routine automobile search which should be governed solely by the principles established by this Court in cases such as Chambers v. Maroney, 399 U.S. 42 (1970), Cooper v. California, 386 U.S. 58 (1967) and Carroll v. United States, 267 U.S. 132 (1925). A brief clarification of the facts set forth in the Petition will be helpful to the consideration of the government's argument.

After an investigation, Customs officers arrested Respondents Duarte, Gomez, Leon, Redmond and Soto at an airstrip located near a picnic area in a remote area of Arizona. Appendix to Petition (hereinafter App.) at 19a-22a. The officers had previously surveilled two small

airplanes landing on the airstrip. The planes were met by pick-up trucks with camper shells that were driven by the above-named respondents. Id. Both of the trucks were loaded with square boxes wrapped in dark plastic and sealed with tape. Id. at 20a. As the officers approached the trucks, they detected the odor of marijuana in the area. Id. at 20a, 27a. Contrary to the Petition, however, the officers never testified that the odor of marijuana emanated from the packages themselves. Compare Petition at 20.

The government strongly suggests, but does not argue, that the nature of the packages could not support a sufficiently reasonable expectation of privacy to trigger the warrant requirement. See Petition at 20. Both the trial court and the Court of Appeals rejected this plain

view argument. App. at 3a-6a, 26a-28a. The trial court rejected the plain view argument after finding that nothing about the shape or other characteristics of the packages made their contents readily ascertainable, id. at 27a-28a. The trial court also found that some of the testimony offered by the government about the nature of the packages was not credible, id. at 20a-22a, n.2. Surely, under these circumstances, any suggestion by the government that the packages did not manifest a reasonable expectation of privacy should be rejected.

After the arrests, the seized packages were transported to the Drug Enforcement Administration warehouse in Tucson, Arizona. Id. at 2a, 22a. Three days later, without obtaining a search warrant, federal agents opened the packages and took core samples of the contents. A labora-

tory analysis proved that the packages contained marijuana. Id.[1]

REASONS FOR DENYING THE PETITION

I. The decision by the Court of Appeals was correct.

a. General principles.

On the merits, the operative question is whether the search below was a package search which could therefore only be conducted under the authority of a warrant, see Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977), or whether it was an automobile search and therefore permissible without a warrant. See United States

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[1]The government contends that the record does not support the three-day delay. Petition at 20-21, n.14. The government first made this contention in a Petition for Rehearing in the Court of Appeals. That Petition was denied. In this Court, however, the government does not contest the finding by the Court of Appeals that the search occurred three days after the seizure. Petition at 21, n.14.

v. Ross, 456 U.S. 798 (1982) and Carroll v. United States, 267 U.S. 132 (1925). A comparison of the rules governing automobile searches and those governing package searches will demonstrate that the ruling below was correct.

The starting point is in the analysis of the presumption in favor of warrants. All searches conducted without a warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. Mincey v. Arizona, 437 U.S. 385, 390 (1978); Katz v. United States, 389 U.S. 347, 357 (1967). If the government seeks to carve out a new exception, the government bears the burden of demonstrating why the situation is so unusual as to justify dispensing with the presumptive protection of a warrant. Mincey, supra at 391. The exceptions that have been created are generally no broader

than is necessitated by the circumstances that gave rise to the exception. Chambers v. Maroney, 399 U.S. 42, 61 (1970), Terry v. Ohio, 392 U.S. 1, 29 (1968), see United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

This general rule (that an exception to the search warrant requirement can be no broader than what is required by the exigencies that gave rise to it) has not been applied to automobile searches.[2] At first, warrantless searches of automobiles were permitted on the theory that automobiles are mobile and therefore it would be impracticable to obtain a warrant before

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[2]Only the warrantless searches of automobiles and the persons of arrestees appear to be exempt from the rule that exceptions to the Warrant Clause can be no broader than is necessitated by the circumstances that gave rise to the exception. See Texas v. Brown, ___U.S.___, 103 S.Ct. 1535, 1544, n.1 (1983) (Powell, J., concurring), United States v. Edwards, 415 U.S. 800 (1974).

the automobile moved to another jurisdiction. Coolidge v. New Hampshire, 403 U.S. 443, 459-60; Carroll v. United States, 267 U.S. at 153. Subsequently, however, warrantless searches of automobiles, based upon probable cause, were allowed long after the automobile had been secured or impounded at the police station. Texas v. White, 423 U.S. 67 (1975); Chambers v. Maroney, 399 U.S. 42 (1970). Clearly, the exigency that was created by the mobility of the automobile was not sufficient to justify those warrantless searches.

The searches were upheld because the Courts reasoned that people enjoy a lesser expectation of privacy in their automobiles and that a search warrant is therefore not required before an automobile can be searched. United States v. Chadwick, 433 U.S. at 12-13; Cardwell v.

Lewis, 417 U.S. 583, 590 (1974) (plurality opinion); Cady v. Dombrowski, 413 U.S. 433, 441 (1973). The lesser expectation of privacy is in part founded on the fact that automobiles seldom serve as the repository of personal effects. Cardwell v. Lewis, 417 U.S. at 590. Perhaps because automobiles do not serve as repositories for personal effects, there is no difference between seizing an automobile to conduct a subsequent search and immediately searching the automobile where it is found. United States v. Ross, 456 U.S. 798, 807, n.9; Chambers v. Maroney, 399 U.S. at 52. Either way, no search warrant is required. Id.

Packages, however, are different. The general rule that warrants are required prior to a search applies fully to packages. The Court has reasoned that, unlike automobiles, whose primary function

is transportation, packages usually serve as repositories for personal effects. Consequently, a person's expectation of privacy in a package is substantially greater than that in an automobile. United States v. Ross, 456 U.S. at 811, United States v. Chadwick, 433 U.S. at 13.

Accordingly, the Court has recognized a difference of constitutional dimension between temporarily seizing a package and actually searching the package by opening it and examining its contents. United States v. Place, ___U.S.___, 103 S.Ct. 2637, 2641 (1983); Texas v. Brown, ___U.S. __, 103 S.Ct. 1535, 1546 (1983); Walter v. United States, 447 U.S. 649, 654 (1980). Compare Chambers v. Maroney, United States v. Ross, supra (no such distinction is made for automobiles). Therefore, if police officers find a movable package in plain view and have probable cause to

believe it contains contraband, they may seize the package temporarily pending the issuance of a search warrant. Texas v. Brown, ___U.S. at ___, 103 S.Ct. at 1547 (Stevens, J., concurring in the judgment). This point is critical, unlike the rule that governs automobiles, the fact that the police are allowed to seize a package does not also allow them to search it without a warrant. United States v. Jacobsen, ___U.S.___, No. 82-1167 (April 2, 1984). Before a seized container may be searched, the police officers must obtain a warrant. As this Court stated in United States v. Chadwick, supra:

> In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before

> their privacy interests in the contents of the footlocker were invaded.

433 U.S. at 15-16.

The fact that the police have lawfully seized the package, however, does not entitle them to hold it indefinitely pending the issuance of a warrant. As Justice Stevens stated in Texas v. Brown, officers are only entitled to seize the package temporarily. 103 S.Ct. at 1547 (emphasis supplied). An analogous case is United States v. Place, ___U.S.___, 103 S.Ct. 2637 (1983). In Place, this Court held that a traveler's luggage, could be briefly detained, based on reasonable suspicion, to investigate the circumstances that aroused the suspicion. 103 S.Ct. at 2644 (emphasis supplied). In Place, a 90-minute detention of a traveler's luggage was deemed unreasonable. Id. at 2646.

b. The applicability of Ross.

The seemingly conflicting principles of Fourth Amendment law that apply to the searches of automobiles and packages converged in United States v. Ross, supra. In Ross, this Court held that if there is probable cause to search an automobile for contraband, the entire automobile, including any packages found in the automobile, may be searched without a warrant. 456 U.S. at 824. After noting that packages are presumptively protected by the Warrant Clause of the Fourth Amendment, the Court nevertheless held that packages could be searched without a warrant as part of a general automobile search. Various reasons were advanced for carving out this exception to the normal protection afforded packages. First, the Court recognized that persons' expectations of privacy, as protected by the Fourth Amendment, vary in

different settings. For example, the Court reasoned, the package carried at the time of arrest may be searched without a warrant regardless of the subjective expectation of privacy that the arrestee might have in the package. Id. at 823.

The Court also noted that a contrary rule would be unnecessarily inconsistent with the rationale supporting the automobile search. Id. at 822, n.28. If the police were prohibited from immediately opening a package found in an automobile, they would be forced to secure the automobile until a warrant could be obtained to open the package, as the police could never be sure that the contraband was not secreted in some yet undiscovered location in the automobile, thus delaying the release of the automobile if in fact no contraband were found. Id. Finally, it was noted that the rule

announced in Ross established a bright line between searches that must be conducted with a warrant and those which can be conducted without a warrant, giving much needed guidance to the police and courts. Id. at 825 (Blackmun, J., concurring); Id. at 826, (Powell, J., concurring).

In the instant case, the packages were not searched when the trucks were searched. Rather, the packages were removed from the trucks and securely placed in the D.E.A. warehouse in Tucson, Arizona. Three days later, without a warrant, they were opened and samples of the contents removed. The application of the above principles to the instant case will establish that the Court of Appeals was correct when it ruled that the packages could not be opened without a warrant.

Initially, it must be remembered that packages, unlike automobiles, cannot normally be searched without a warrant. United States v. Ross, United States v. Chadwick, United States v. Jacobsen, supra. This is because packages, unlike automobiles, are often repositories for personal effects. Ross, Chadwick, supra. Nevertheless, if a package is found in an automobile, and there is probable cause to search the automobile, the package may also be searched, without a warrant, as part of the automobile search. Simply stated, the fact that the package is found in an automobile creates an exception to the normal rule that a warrant is necessary to search the package.

This result is in part justified by analogizing automobile searches to searches incident to an arrest. If a person in possession of a package is arrested, that

package, even though it is normally protected by the Warrant Clause, may be searched incident to the arrest without the warrant. New York v. Belton, 458 U.S. 259 (1981). The analogy is well taken. Like automobiles, arrestees enjoy a lesser expectation of privacy in their persons. Mincey v. Arizona, 437 U.S. at 391; United States v. Edwards, 415 U.S. 800, 808-809 (1974). Consequently, an arrestee's person may be searched without a warrant long after his or her arrest and incarceration. United States v. Edwards, supra. Similarly, an automobile may be searched without a warrant long after it has been impounded by the police. Texas v. White, supra.

The application of the above principles does not dictate, however, that packages found on a person at the time of arrest may be searched long after they have been removed from the possession or control of

the arrestee. Nor should it follow that packages found in a car that is subject to search may be searched long after they have been removed from the car. Illustrative is United States v. Chadwick, supra.

When Chadwick was arrested, he was in the process of lifting his footlocker into the trunk of a car. 433 U.S. at 4. Presumably, the footlocker could have been seized and searched immediately pursuant to Chadwick's arrest. New York v. Belton, supra, Chimel v. California, 395 U.S. 752, 763 (1969). The arresting police officers, however, declined to exercise their right to conduct an immediate search of the footlocker and elected instead to transport it to the federal building where it was secured under the exclusive control of law enforcement authorities. Since the footlocker was no longer immediately

associated with the person of the arrestee, the reasons that would have allowed a warrantless search no longer applied and this Court held that a warrant had to be obtained before the footlocker could be searched. 433 U.S. at 15. Accord Preston v. United States, 376 U.S. 364 (1964).

In Ross, the sole reason the packages could be searched was that they were found in an automobile that was subject to a warrantless search. Similarly, the footlocker in Chadwick was subject to search at the time of arrest solely because it was in the possession or control of the person arrested. Once the police declined to exercise their right to conduct an immediate search, and elected instead to remove the footlocker to a law enforcement warehouse, the reasons that would have permitted an immediate search of the footlocker no longer existed.

The lesser expectation of privacy that society recognizes in an arrested person no longer applied to the footlocker. The presumptive protections of the Warrant Clause applied again. By the same reasoning, once the Customs agents in this case declined to exercise the right to search the packages as part of the automobile search and elected instead to store the packages at the D.E.A. warehouse for several days, no right to conduct a warrantless search existed. When the packages were in the exclusive control of the D.E.A., there was no longer the critical nexus between the trucks and the packages. The lesser expectation of privacy that society recognizes in automobiles no longer applied to the packages. The Warrant Clause of the Fourth Amendment once again demanded that the officers obtain a warrant before the packages could

be searched. United States v. Chadwick, 433 U.S. at 13, 15-16.

The other reasons advanced by the Ross court in support of warrantless package searches also do not apply here. The Ross court noted that requiring a warrant to search a package found in an automobile would unnecessarily delay the search of the automobile, thus undercutting the rationale of Carroll and Chambers, which authorize the immediate search of an automobile. In this case, the search of the packages was delayed by the action of law enforcement officers for three days. Certainly, if the officers had obtained a warrant to search those packages during the three days, the search of the trucks would not have been further delayed. The rationale of Carroll and Chambers simply does not apply here.

Another virtue of Ross is that it gives

police and courts a bright and clear rule about when packages may be searched without a warrant. There is no brighter and clearer rule in Fourth Amendment jurisprudence, however, than the rule that all searches conducted without a warrant are per se unreasonable. Mincey v. Arizona, 437 U.S. at 390; Katz v. United States, 389 U.S. at 357. Any exception to this first rule of Fourth Amendment jurisprudence should be no broader than the circumstances that give rise to it. Chambers v. Maroney, 399 U.S. at 61; Terry v. Ohio, 392 U.S. at 29; United States v. Rabinowitz, 399 U.S. at 70 (Frankfurter, J., dissenting).

In this case, the reasons that justify the warrantless search of a package found during the course of a legal automobile search certainly do not justify a search of the package three days after it has

been stored in a law enforcement warehouse. Consequently, the Ross exception should not be extended to govern the instant situation. Chambers v. Maroney, 399 U.S. at 61, Terry v. Ohio, 392 U.S. at 29, United States v. Rabinowitz, 399 U.S. at 70 (Frankfurter, J., dissenting), supra. The government has not been able to demonstrate why this situation is so unique to justify dispensing with the protection of a warrant. Mincey v. Arizona, 437 U.S. at 391. Consequently, the only bright line rule that the police should be instructed to follow in a situation such as this is that, absent exigent circumstances, they must obtain a warrant before opening the package. See United States v. Chadwick, 433 U.S. at 13, 15-16.

c. Other reasons that support the decision by the Court of Appeals.

Packages are not normally seized because they, in and of themselves, are contraband or evidence of a crime. Rather, they are seized because it is believed that they contain contraband or evidence. It is clear that without a warrant, such packages can be temporarily seized in anticipation of obtaining a warrant. Texas v. Brown, ___U.S.___, 103 S.Ct. at 1547 (Stevens, J., concurring in the judgment). They can only be temporarily seized, however, because to secure them for an unreasonable period of time without examining the contents would undoubtedly violate the Fourth Amendment. Cf. United States v. Place, ___U.S.___ at __, 103 S.Ct. at 2647 (a 90-minute detention, based on reasonable suspicion,

of a traveler's luggage was unreasonably long).

In this case, had the police searched the packages immediately and found that they contained innocent items, the packages could have been immediately returned to the respondents and no unconstitutional seizure would have occurred. Texas v. Brown, (Stevens, J., concurring in the judgment), United States v. Place, supra. If the 90-minute delay in Place was deemed unreasonable because this Court reasoned that the investigation of the luggage should not have taken so long, certainly the three-day period in this case was far longer than what was necessary to obtain a warrant. The three-day delay was an unnecessary invasion of a person's right to possession of packages. United States v. Place, supra.

Nonetheless, the government argues that

since the packages could have been searched when they were seized at the Bowie airstrip, the respondents had no recognizable expectation of privacy that the contents would remain secret in the future. In support of this proposition, the government cites Illinois v. Andreas, __U.S.___, 103 S.Ct. 3319 (1983) and United States v. Edwards, 415 U.S. 800 (1974). Neither case supports the government's argument.

In Illinois v. Andreas, a container arriving from Calcutta, India was searched by a Customs inspector at O'Hare International Airport. Contraband was found within the container. A controlled delivery was then made to Andreas' apartment. A few minutes later, when Andreas attempted to leave the apartment with the container, he was arrested. Id. at 3322. The container was taken to the police station

where it was opened without a warrant. Id. As the container had already been legally opened by the government during the Customs search, this Court held that Andreas did not have any expectation of privacy that the container would not again be opened by police officers at the police station. Id. at 3324-25. Unlike the situation in Andreas, the instant packages were opened for the first time after the packages had been stored in the D.E.A. warehouse for three days. Clearly therefore, Andreas does not apply to the instant situation.

United States v. Edwards does not help the government either. In Edwards, this Court upheld the warrantless seizure of a suspect's clothing several hours after he had been arrested and jailed. 415 U.S. at 808-09. Edwards does not support the government's argument because, like auto-

mobiles, arrestees have lesser expectations of privacy in their persons. Mincey v. Arizona, 437 U.S. at 391. Consequently, an arrestee's person and his clothing can be searched without a warrant. There is no such lesser expectation of privacy in packages. Consequently, Chadwick, discussed above, is much more applicable to the instant situation than is Edwards.

While the cases cited by the government do not support its argument, the rationale of other decisions of this Court support the decision of the Court of Appeals. See Michigan v. Tyler, 436 U.S. 499 (1978), United States v. Chadwick, 433 U.S. 1 (1977) (discussed above), G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977), Preston v. United States, 376 U.S. 364 (1964).

For example, in Michigan v. Tyler this Court held that after extinguishing a fire

in a building, officials may remain in the building for a reasonable time to investigate the cause of the fire. No warrant is necessary for this investigation. 436 U.S. at 510. The fact that a warrantless investigation is immediately permissible, however, does not give officials the right to return to the building days later to conduct the inspection. If the inspection is to be conducted days after the exigency of the fire has ended, the officials must obtain a warrant before the building can be entered. Id. at ___. Accord Michigan v. Clifford, ___U.S.___, 104 S.Ct. 641, 648-49 (1984) (plurality opinion). Clearly, the principle that the officials could immediately inspect the building did not result in a diminished expectation of privacy days later when the officials sought to conduct a subsequent inspection.

In G.M. Leasing Corp., supra, the

evidence showed that law enforcement officials could have entered a building without a warrant because exigent circumstances were present. 429 U.S. at 361-62 (Burger, C.J., concurring). Rather than acting immediately, however, the agents chose to wait two days before entering the building. Id. This Court held that the agents' delay prohibited them from entering the building without a warrant. Id., 429 U.S. at 358. Like the defendants in Chadwick, Preston, Tyler and Clifford, the defendant had a diminished expectation of privacy in his building when law enforcement officers were immediately entitled to search the building without a warrant. When the officers instead elected to delay the search, the diminished expectation of privacy did not continue. Rather, the presumptive protection of the Warrant Clause once again asserted itself and a

warrant became necessary before the building could be entered. The common thread in all these cases is that police were no longer allowed to search without a warrant when delay had undercut the reasons that initially would have allowed such a search. Any diminished expectation of privacy that was created by an exception to the warrant requirement was coterminous with the reasons that gave rise to the exception.

Similarly, in this case, the respondents undoubtedly had a diminished expectation of privacy in their packages when the officers were entitled to search the packages, without a warrant, as part of an automobile search. When the officers elected not to search the packages, however, and instead transported them to the D.E.A. warehouse in Tucson, the respondents' expectation of privacy in

their packages was no longer diminished. Rather, as in the above cases, the Warrant Clause again demanded that the officers obtain a warrant before inspecting the packages. Again, a warrant was required because the delay had undercut the reasons which initially would have allowed a warrantless search.

The balance of the cases cited by the government simply do not apply to the instant situation. Virtually all of those cases involve the searches of automobiles. For various reasons, this Court has allowed the searches of automobiles long after they have been immobilized by impoundment at a law enforcement warehouse. See e.g., Cooper v. California, 386 U.S. 58 (1967), Cady v. Dombrowski, 413 U.S. 433 (1973), Cardwell v. Lewis, 417 U.S. 583 (1974), South Dakota v. Opperman, 428 U.S. 364 (1976). None of

these cases involved the searches of packages days after the packages had been removed from automobiles. Consequently, for the reasons discussed above, none of these cases are applicable to the instant situation.

II. Additional reasons that the Court should deny the Petition.

In addition to the merits of the issue presented, respondents offer the following additional reasons that this Court should deny the Petition.

a. The decision below is not in conflict with the decisions of other circuits.

Petitioner argues to this Court that the decision below is in conflict with United States v. Rivera, 684 F.2d 308 (5th Cir. 1982), United States v. Schecter, 717 F.2d 864 (3rd Cir., 1983), and Sharp v. United States, 712 F.2d 65 (4th Cir. 1983). An examination of those cases, however, reveals no such conflict.

United States v. Schecter, supra, did not even involve the search of a package. Consequently, it cannot be in conflict with the decision below. In both United

States v. Rivera, supra, and Sharp v. United States, supra, searches of packages found in automobiles were conducted about two days after the packages had been removed from automobiles. In neither case, however, was the issue presented in this case ruled on. Rather, in Rivera and Sharp, the litigants never argued that the delay in opening the packages rendered the automobile exception inapplicable. Therefore, the conflict asserted by the government does not, in fact, exist.

In order to consider a conflict between decisions of courts of appeals as a reason for granting a petition, this Court ordinarily requires a square and irreconcilable conflict between the lower courts. See, e.g., Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 559 (1968); Northeastern National Bank v. United States, 387 U.S. 213, 217 (1967). It has been suggested

that a conflict in decisions between various circuits should be relied upon as a ground for certiorari only in instances where it is clear that the conflict is evident and that it can be effectively resolved only by the prompt action of this Court alone. Mr. Justice Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Australian L.J. 109 (1959).

No such irreconcilable conflict exists here, since the circuit courts cited by Petitioner have not even addressed the issue upon which the lower court decision was based in this case.

b. The decision in this case is not one which is likely to affect a significant number of future cases.

In determining whether or not to grant a given petition, this Court has always considered of paramount importance whether

or not the decision of the lower court will have a significant impact on future cases. See Stern and Gressman, Supreme Court Practice, §4.11, pp.284-285 (1978). The concept of importance relates, of course, to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923); Rice v. Sioux City Cemetary, 349 U.S. 70, 79 (1955).

The facts which give rise to this case are not facts which should recur to any significant extent. In most cases where officers arrest suspects in situations akin to this one, they will have a clear right to search packages found in an automobile at the scene. This right, in most contexts, is derived from several well-established constitutional prece-

dents.

In United States v. Ross, 456 U.S. 798 (1982), this Court approved of an immediate search of items resting in an automobile pursuant to the "automobile exception" to the warrant requirement. Likewise, in future cases, where immediate searches are conducted with probable cause at the time of the seizure of the automobile, there will be no difficulty in lower courts applying the Ross doctrine so as to validate the searches.

Additionally, in jurisdictions which allow inventory searches upon the seizure of a vehicle, subsequent warrantless searches of packages can be upheld based on the inventory search rationale approved by this Court in Illinois v. Andreas, ___ U.S.___, 103 S.Ct. 3319 (1983). The "inventory search" rationale was never argued in this case as a rationale for the

government's warrantless search of the packages, either before the District Court or the circuit Court of Appeals.

Finally, in many cases where warrantless searches of packages found in an automobile are made subsequent to lawful arrests, warrantless package searches can be justified as incident to the arrest of those persons taken into custody. See, e.g., New York v. Belton, 458 U.S. 259 (1981).

The issue presented for decision before this Court is not likely to recur with any frequency. Given the clear justifications which will usually allow police officers to search packages found in an automobile at the scene of an arrest, delays of the length which existed in this case will be rare. Consequently, a decision by this Court, given the peculiar circumstances of this case, will not have any overriding

impact on the system.

CONCLUSION

There are various reasons the Petition should be denied. First, the decision of the Court of Appeals was correct on the merits. All searches conducted without a warrant are per se unreasonable, subject to only a few limited exceptions. Generally, the exceptions are no broader than is necessitated by the circumstances that gave rise to the exceptions. For example, after extinguishing a fire, authorities are allowed to remain on the premises without a warrant to investigate the cause of the fire, and to ensure that it does not reignite. If the investigation is delayed, however, and the authorities seek to investigate the cause days later, a warrant is needed. Only when the authorities are searching automobiles and the persons of arrestees may the search be

conducted without a warrant even after it would be practicable to get one. This is because there is lesser expectation of privacy in the persons of arrestees and in automobiles.

No such lesser expectation of privacy exists in packages. Consequently, any exception to the warrant requirement that allows the warrantless search of packages should be no broader than the circumstances that gave rise to the exception. Packages may be searched without a warrant when they are found in an automobile that is subject to warrantless search. This is allowed to facilitate the search of automobiles for which no warrant is needed. If, however, a package found in an automobile is not searched as part of the automobile search, but instead is secured for several days in a government warehouse, the reasons for allowing a

warrantless search no longer apply. The reasons for allowing a warrantless search of the automobile will not be advanced by allowing a warrantless search of the package. Consequently, a warrant should be required before the package can be opened. For the above reasons, it is submitted that the decision of the Court of Appeals was correct and should not be disturbed by this Court.

The Petition should also be denied because the decision below is not in conflict with the decisions of other circuits of the Court of Appeals.

Finally, and perhaps most importantly, the decision below should not have a significant impact on future cases. In similar factual situations, the police will be able to search the packages without a warrant pursuant to other exceptions to the Warrant Clause. Factual situations

similar to the instant one are unlikely to recur with frequency.

For all of the above reasons, it is respectfully requested that the Petition be denied.

RESPECTFULLY SUBMITTED this 29th day of May, 1984.

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